United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1416

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

RAYMOND LEO COWLES,

Defendant-Appellant.

DOCKET NO. 74-1416

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL

To be argued by:

LEE CLARY
Attorney for Defendant-
Appellant
Office and P. O. Address
316 Sherman Street
Watertown, New York 13601
Telephone: (315) 782-1670

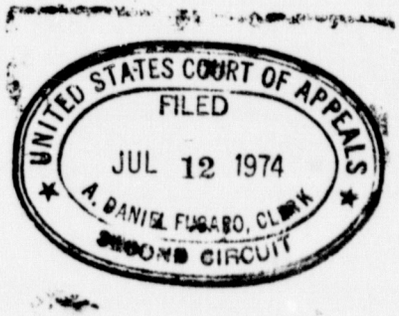

TABLE OF CONTENTS

TABLE OF CASES

I. ISSUES PRESENTED FOR REVIEW

A. The trial court erred in giving the supplementary or "Allen" charge to the jury after the jury indicated they were in disagreement and unable to arrive at a unanimous verdict.

1. The circumstances under which the supplemental charge was given rendered the charge coercive and deprived the defendant of a trial by a fair and impartial jury.

2. The Allen charge is inherently prejudicial and should be abolished.

B. The trial court erred in refusing to ask certain questions proposed by the defendant's attorney of the jurors during the voir dire examination.

C. The trial court erred in refusing to charge defendant's proposed instructions on identification.

D. The trial court erred in admitting the testimony of the defendant's cellmate as to alleged admissions made by the defendant without notice of such admissions given to the defendant prior to the commencement of the trial.

II. STATEMENT OF THE CASE

This appeal is from a judgment of March 29, 1974, convicting the defendant-appellant of one count of robbery [18 U.S.C. 2113 (b) (2).] A trial was held in Utica, New York, between February 4 and February 12, 1974, before the Honorable

Lloyd F. MacMahon, United States District Court Judge sitting by designation, and a jury.

The defendant was indicted in connection with a robbery of a branch of Marine Midland Bank-Northern in Pamelia, New York on August 30, 1973. The indictment was originally a four count indictment charging violations of Title 18 U. S. Code U.S.C. §2113 (a) (b) (d) and §2, which sections define various charges of bank robbery and Title 18 U.S.C. §371 which defines conspiracy. In November of 1973, a pretrial hearing was held before the Honorable James T. Foley in Albany, New York, on a motion by the defendant to suppress the identification testimony of several witnesses on the grounds that the pretrial identifications procedures were prejudicial to the defendant as being impermissably suggestive. Judge Foley denied defendant's motion and a trial before Judge Foley and a jury was held in Albany in November of 1973. At the end of the prosecution's proof, in the Albany trial, the Government and the defense moved to dismiss the conspiracy count against the defendant and said motion was granted. The trial jury after approximately seventeen hours of deliberation on two successive days was unable to reach unanimous agreement on the remaining bank robbery counts and a mistrial was granted on the defendant's motion.

At the defendant's second trial in Utica, New York, there was no issue that a robbery had been committed at the

time and place alleged. The sole issue was the identification of the defendant-appellant as the driver of the alleged getaway car used in the robbery on August 30, 1973. Three witnesses testified that they observed the defendant sitting behind the wheel of a Chevrolet vehicle in front of the Marine Midland Bank at the time of the robbery. Jean Schultz (A-49 to 110) testified she was in the laundromat some 35 to 40 feet from the driver of the getaway car when she first noticed him. She described him as having a hat on with a flat, round, brim, somewhat greyish in color and he had dark hair. She saw highlights in his hair which were described later as reddish highlights. He had on tinted glasses which were rimless and he had a very distinctive smile. (A-55 to 56). She testified she was shown photographs by various police officers and on one occasion, approximately two weeks after the robbery, she was unable to select any photograph as being the picture of the driver of the car. She was able to pick out a photograph that was the closest in resemblance to the driver. (A-62). Although the photograph of Raymond Cowles was among the photographs exhibited to Mrs. Schultz by Investigator Semione, she selected the photograph of Dennis Charles Purcell as most closely resembling the driver (A-87). She also stated that at the time of the exhibition of photographs, the image of the driver had faded from her mind (A-88 to 89). Mrs. Schultz did select the defendant from among six individuals at a line-up at the

Jefferson County Jail on September 13, 1973 (A-66). Mrs. Schultz also stated that she did not really look at the other individuals in the line-up (A-97).

Mr. Donald Schultz, Mrs. Schultz' husband also testified (A-110 to 158). He stated he was in the laundromat with his wife and viewed the driver of the alleged getaway car and his passenger getting into the vehicle. He described the driver as having black hair or dark hair, wearing a hat, glasses and a mustache. He stated he observed him for about five seconds (A-117 to 119). He also was shown photographs by Officer Semione and did select the photograph but stated he was not positive that the man in the photograph was the driver but it looked the most like the one who he had seen driving the car (A-124). He did say that on the 12th day of September, 1973, he did select the defendant, Raymond Cowles in a line-up at the Sheriff's office.

Jeffrey Potter, a 14 year old boy testified (A-171 to 207) that he observed the defendant behind the wheel of the alleged getaway car from inside the Marine Midland branch Bank (A-180). He described the driver as having dark hair, probably brown about between the ear and neck in length and it was curly and he had a mustache, quite bushy to the corners of his mouth and he was wearing glasses (A-180). He states he was about 50 feet away from the driver when he made this observation (A-181). Jeffrey Potter was not shown any photographs but did participate in the line-up at the Sheriff's office on approximately September

12th or 13th. He did make a selection on his second viewing of the participants in the lineup (A-185). Jeffrey Potter said that there were no reddish highlights in the driver's hair. (A-194). The lenses of the driver's glasses were not tinted but were plain. (A-195). Jeffrey's recollection is that the driver was not wearing a hat. (A-196). The view Jeffrey had of the driver was a side view of the left side of his face. (A-197).

The testimony of Charlotte Palmer was read into evidence (A-159). She testified that she observed an individual driving a red convertible which was pulling out from the Air Brake Company's garage on the Starbuck Road in Watertown. She described the individual as being a dark haired young man with sideburns and he had a fairly round face and had glasses on and they were rimless. He also had a mustache and was operating a red convertible. She identified this individual as Raymond Leo Cowles (First trial transcript, page 258). She also was shown photographs by Investigator Semione and selected a photograph of Raymond Leo Cowles as the one resembling the person she had seen. (First trial transcript, page 260). Mrs. Palmer also some two weeks after the robbery participated in the line-up at the Sheriff's office and on her second view selected Raymond Leo Cowles as someone she had recognized. (First trial transcript, page 262 through 264). Mrs. Palmer noticed that the top of the convertible was down. (First trial transcript, page 274).

The glasses were not sunglasses but were ordinary plain lenses, not tinted or having a dark shade. (First trial transcript, page 278). Mrs. Palmer did not see any red tinges or highlights in the hair of the driver of the red convertible. (First trial transcript, page 279).

George Eiss testified (A-448 through 475). He stated he was in the vicinity of the Marine Midland Bank at the Seaway Plaza about 10:30 of the morning of August 30, 1973. He had parked his automobile near the Bank. He stated he was about 80 feet from a 1965 or 1966 Chevrolet when he observed the man sitting behind the wheel (A-453). He described the individual as having a mustache, a set of tinted glasses, sideburns and he thinks he had a hat. He was not positive as to whether or not the driver had a hat or a mustache. (A-454 to 455). At the time he observed him, the witness Eiss stated that in his opinion he believed him to be middle-aged or about Mr. Eiss' age, 43. (A-455). The only view Mr. Eiss obtained of the individual was from a distance of 80 feet. (A-456). Mr. Eiss stated that he told an F.B.I. Agent the day after the robbery that the individual he viewed in the blue Chevrolet looked like a million other people and was between 45 and 50 years old, wearing glasses. (A-460). Mr. Eiss was not shown any photographs by any Police officers. (A-460). Mr. Eiss did select Raymond Leo Cowles from the line-up of six individuals at the Sheriff's office. He

stated the other five individuals in the line-up were dissimilar to the driver of the getaway car (A-461).

Eugene Blair's testimony given at the first trial in Albany was read into evidence (A-475). Mr. Blair was in the Bank at the time of the robbery. (First trial transcript, page 377). He stated he saw the back and top of the head of the driver of the car outside of the Marine Midland Bank. The driver had on an orange parka and did not have a hat on. (First trial transcript, page 383).

Two alibi witnesses testified for the defense. Wayne Prosser (A-343 through 387) and John Johnson (A-399 through A-448). Wayne Prosser testified that he is sixteen years of age and was a student at Case Junior High School. On August 30, 1973, he was working at the jail on the corner of Coffeen and Massey Streets in Watertown washing cars, mowing lawns. He went to work at 8:00 a.m. and met his friend, John Johnson at 10:30 a.m. at the garage outside the jail. John helped him to wash a car and then they left. (A-346). He left the Sheriff's office at about 10:45 a.m. and walked down Court Street some three hundred (300) yards to the Christian Shop. (A-346 to 347). This trip took two to three minutes (A-347). He and John Johnson went in the Christian Shop and asked about a necklace and then came out of the shop and were looking in the window when a white station wagon being driven by Raymond Leo Cowles pulled up in front of the store (A-348). In the

car with Raymond Cowles was John's brother, James Johnson. (A-348). Wayne Prosser was introduced to Raymond Cowles as he had not known him prior to that morning (A-349). The two boys were asked if they wanted to go for a ride and they got in the station wagon. (A-349). The vehicle headed over the Court Street bridge and out LeRay Street towards Raymond's house near Theresa, New York (A-350). While the vehicle was travelling on LeRay Street, a grey silver car passed them with the siren on and its lights flashing. (A-350 to 351). Wayne Prosser recognized the vehicle as being a Sheriff's car which he had previously washed. (A-351). Wayne testified that the radio in the station wagon was on station WOTT which was playing. As they were headed out towards Cowles' house and near a motel, an announcement came over the radio that the Seaway Plaza Bank had just been robbed (A-353). John Johnson also testified as to meeting Raymond Cowles and his brother, James Johnson, outside of the Christian Shop at about 10:45 a.m. It was about 10:50 a.m. when he saw Raymond Cowles and his brother (A-418). The Bank employee, Myrna Cauley had testified that the Bank was robbed between 10:30 and 10:45 a.m. on August 30, 1973. (A-37 and A-38).

Raymond Leo Cowles, the defendant, testified (A-485 through 513) that he was not involved in any way with the Bank robbery at the Marine Midland Bank-Northern on August 30, 1973. (A-486). He stated that he was in a white station

wagon with James Johnson the morning of August 30, 1973. He stated he drove up Court Street and picked up John Johnson and a boy introduced to him as Wayne Prosser (A-489). Then the vehicle went to Raymond's home near Theresa, New York and then to Crystal Lake and returned to Glen Park, New York (A-491).

On February 11, 1974, the jury began its deliberations and at 4:27 p.m. the jury returned to the Court room and asked to read Wayne Prosser's testimony and also requested that the Court send the map of Jefferson County into the jury room. This was done and the jury returned to their deliberations. At 9:50 p.m. of the evening of February 11, 1974, the jury reported to Judge MacMahon by note that they were in disagreement by a 10 to 2 margin. Judge MacMahon refused to accept the hung jury verdict and sequestered the jury for the night. He then denied the motion by defense counsel for a mistrial (A-625).

On Tuesday morning at 10:00 a.m. on February 12, 1974, Judge MacMahon delivered to the jurors the so-called Allen charge or supplemental charge. (A-626 through 628). The defense attorney's motion for a mistrial was again denied. (A-629). At 11:08 a.m. the jury requested to hear testimony of Charlotte Palmer which was read and at 11:37 a.m. the jury returned to their deliberations. At 12:02 p.m. on February 12, 1974, the jury reported a verdict of guilty. (A-630).

III. ARGUMENT

A. THE TRIAL COURT ERRED IN GIVING THE SUPPLEMENTARY OR "ALLEN" CHARGE TO THE JURY AFTER THE JURY INDICATED THEY WERE IN DISAGREEMENT AND UNABLE TO ARRIVE AT A UNANIMOUS VERDICT.

1. THE CIRCUMSTANCES UNDER WHICH THE SUPPLEMENTAL CHARGE WAS GIVEN RENDERED THE CHARGE COERCIVE AND DEPRIVED THE DEFENDANT OF A TRIAL BY A FAIR AND IMPARTIAL JURY.

As noted above, the jury had been deliberating for some four hours when it indicated to the Judge that it was in disagreement. The Judge sequestered the jury for the evening and the next morning, the Judge delivered to the jury what is known as the "Allen" charge. Allen vs. United States, 164 U.S. 492 (1896). The jury resumed its deliberations and after requesting the reading of testimony, returned a verdict of guilty. The Appellant asserts that, even assuming arguendo, the validity of the Allen charge generally, the instructions here exceeded the permissible limits enunciated in reported cases.

Virtually every recent case in the Federal Circuit Courts of Appeal has either disapproved the Allen charge or required that it be coupled with "cautionary phrases assuring that individual jurors were not being asked to vote against their judgment". United States vs. Hynes, 424 F 2d, 754

(2d Cir. 1970) cert. den. 399 U.S. 933 (1970) at 756.

This Circuit Court has upheld the Allen charge with some reluctance and only in cases where additional cautionary statements are added to the charge itself. In United States vs. Jennings, 471 F 2d 1310 at 1314, cert. den. 411 U.S. 935 (1973), this Court upheld a supplemental charge which consisted of the Allen language coupled with warnings that the jurors should only bring back "what you believe to be a verdict based on the evidence" and not to "give up what you feel to be a proper verdict based on the evidence for the sake of unanimity". In United States vs. Miller, (5th Cir. 1973), 487 F 2d, 1308, this Court held that the Allen charge was not unduly coercive since "other statements delivered at the same time reaffirmed the need for each juror to vote his conscience. . .". In United States vs. Martinez, 446 F 2d 118 at 119, cert. den. 404 U.S. 944 (1971), the Allen charge was upheld because it was coupled with statements which met the standards set up in United States vs. Hynes, supra. See also United States vs. Bowles, 428 F 2d 592 cert. den. 400 U.S. 928 (1970); United States vs. Meyers, 410 F 2d, 693, cert. den. at 396, U.S. 835 (1969); United States vs. Tyers, 487 F 2d 828 (1973); United States vs. Rao, 394 F 2d, 354 (1968); and United States vs. Kahaner, 317 F 2d 459, cert. den. 375 U.S. 836, (1963).

Essentially, then the decisions have upheld the Allen charge to encourage verdicts but only "absent coercive

circumstances and provided it was made clear that jurors were not to yield their conscientious convictions". United States vs. Bowles, supra at 595.

In this case, the District Judge gave the Allen charge practically verbatim without adding the required additional cautionary language. In fact, he read not only the words of the charge from the Allen opinion but continued to read an additional sentence out of the Court's actual opinion. This itself has been held to be grounds for reversal. Williams vs. United States (D.C. Cir. 1964) 338 F 2d 530, 533. By so doing, it is submitted the jury was coerced into assuming an inherently faulty major premise; namely, "the majority is right" and "that the minority in a given group possesses attributes of spurious rationality". United States vs. Fioravanti (3rd Cir.) 412 F 2d 407, 414 (19--).

The requirement that there be additional cautionary phrases added to the Allen charge is certainly not limited to the Second Circuit. See, for instance, United States vs. Bailey (5th Cir.) 468 F 2d 652 (1972), and Sullivan vs. United States (9th Cir. 1969) 414 F 2d 714. In fact, it has been pointed out that in the original Allen case, the Court relied upon Commonwealth vs. Tuey 62 Mass. 1 (1851), which emphasized the importance of reinstructing the jury on burden of proof.

Whatever arguments may be used to preserve the validity of the Allen charge, there is no justification whatsoever for its

coercive use. Green vs. United States (5th Cir. 1962) 309 F 2d 852.

The inference of coercion stemming from the use of the Allen charge is particularly strong in this case for several reasons. First of all, there had been a prior hung jury in a previous case with the same defendant under the same charge. As in United States vs. Bailey, supra, ". . . the inference of coercion is here strengthened by the fact that a prior jury could not return a verdict in a trial of the same cause. . .". See Thaggard vs. United States, 354 F 2d 735 at 740 (5th Cir. 1965), where it was stated "it is significant that there had been a hung jury in the previous trial". In fact, the previous jury had spent seventeen (17) hours deliberating and was unable to return a verdict. In the original Allen case, supra, which is relied upon by every court which supports the charge stemming from that decision, there had been no previous hung jury. In fact, twice before, juries had demonstrated that they could reach unanimity in finding the defendant guilty of murder. In the case at bar, it had been demonstrated that there is a close issue of fact upon which reasonable men can and did disagree, and in which it had previously been demonstrated that jurors could find a reasonable doubt.

Also of significance in Cowles, there was a close issue of fact, turning on the credibility of the eyewitnesses for the Government and the alibi witnesses for the defendant.

Prior to its initial announcement that it was in disagreement, the jury had asked to have read to it the testimony by Wayne Prosser, an important alibi witness for the defense. Five hours later, the jury sent a note to the Judge saying it was in disagreement. It is obvious that at least two of the jurors believed a reasonable doubt had been raised by the defendant's witnesses. To subsequently give the Allen charge was to intimidate and coerce those minority jurors to yield to the majority view in spite of their beliefs.

It is also clear that there was a more coercive effect on the jury by the fact that the charge was given after only some three hours of deliberations. The Judge had several options open to him at the time he was informed of the jury disagreement. First of all, he could have declared a mistrial. This would have been particularly appropriate in view of the prior hung jury and in view of the close factual issues.

The Judge also had the option of asking the jurors if there was any possibility of reaching an agreement before he gave the Allen charge and sent them back into deliberate. If the answer was "no", then it clearly would have been coercive to send them back to deliberate. If they said "yes" he could have sent them back to deliberate without giving them the supplemental charge.

A third possibility is that the Judge could have simply told the jury to go home and try again tomorrow morning.

There was no demonstration here that the Allen charge was necessary, nor that it was proper under the circumstances. It should be pointed out that a supplemental charge given after the jury has already been deliberating is in itself coercive. There is an"inherent danger in this type of instruction when given to an apparently deadlocked jury. . .". If it is given at all, it should be "incorporated in the body of the original instructions". United States vs. Wynn (10th Cir. 1969) 415 F 2d 135, 137 cert. den. (1970) 397 U.S. 994. By giving such an instruction after the deliberations have begun, the Court crosses the barrier into the jury room and invades the province that constitutionally belongs only to the jury.

Because of the inherent coercive nature of a supplemental charge, it has been urged that in giving additional instructions to the jury ". . . the Court should be especially careful not to give an unbalanced charge". It has been suggested that the Judge repeat the entire original charge or, as we have noted above, remind the jury of the burden of proof and the presumption of innocence. . . or take other steps to avoid any possible prejudice". United States vs. Sutherland (5th Cir. 1970) 428 F 2d 1152. Such caution was not taken in this case and the result was an unbalanced charge, highly prejudicial, the effect of which was to coerce the jury into returning a verdict of guilty with only an hour's further deliberation.

2. THE ALLEN CHARGE IS INHERENTLY PREJUDICIAL AND SHOULD BE ABOLISHED.

Even if the necessary precautions were taken in giving the charge and the prejudicial circumstances were not attendant in this case, defendant contends that the giving of the charge itself compromised his constitutional right to due process and trial by a fair and impartial jury. As was stated in United States vs. Greene, supra, the vice in the charge is the Court's interference with the jury function. No matter when the charge was made, it gives the jury false notions of the validity and force of majority opinion; it tends to limit full and free discussion in the jury room; it prejudices the right of an accused to a hung jury and a mistrial by tending to stifle the dissenting voices of minority jurors. The Allen charge is coercive in its nature. The Third Circuit, in prospectively outlawing the Allen charge, has put it best:

> "The possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty. And although dictates of sound judicial administration tend to encourage the rendition of verdicts rather than suffer the experience of hung juries, nevertheless, it is a cardinal principle of the law that a trial judge may not coerce a jury to the extent of demanding that they return a verdict." (The Allen charge) "contains no admonition that the majority re-examine its position; it cautions only the minority to see the error of its ways. It departs from the sole legitimate purpose of a jury to bring back a verdict based on the law and the evidence received in open court, and substitutes therefore a direction that they be influenced by some sort of Gallup poll conducted in the deliberation room . . . all of

> this constitutes an unwarranted judicial invasion into the exclusive province of the jury . . ." United States vs. Fioravanti, supra.

Nor is there any legal rule that the majority of jurors have better judgment than the minority. Green vs. United States, supra, note 1, 305 F 2d at 855. Indeed a mistrial is as much a part of the jury system as a unanimous verdict.

The flaws and dangers of the Allen charge are well known and have been cited by this Court and every other Circuit Court in the nation, as well as many State Courts. In the District of Columbia Circuit, the Allen charge has been totally forbidden because of its highly prejudicial and coercive nature. United States vs. Thomas 449 F 2d, 1177 (1971). The First Circuit has warned that the Allen charge "should be used with great caution and only when absolutely necessary". United States vs. Flannery, 451 F 2d 880, 883 (19--) The Third Circuit also outlawed the use of the Allen charge in United States vs. Fioravanti, supra, (1970). When in a District Court in the Third Circuit, a conviction was obtained through the use of the Allen charge, the Third Circuit said that such use was reversible error, per se, even with the cautionary phrases attached to it. Government of Virgin Islands vs. Hernandez, 476 F 2d 791 (1973). The Fourth Circuit refuses to allow trial judges to depart in the least from the language of Allen itself, because of the danger of coercion. United States vs. Rogers 289 F 2d 433.

The Fifth Circuit requires that the Allen charge be coupled with a supplemental instruction admonishing the jurors that they should neither acquiesce in a verdict nor do violence to their consciences. But as that Court has pointed out, "the indisputable modern trend is to abandon Allen". United States vs. Bailey, supra, at 668. In Jones vs. Norvell 472 F 2d 1185 (1973), the Sixth Circuit termed the Allen charge a "coercive jury charge". In 1973, the Seventh Circuit prescribed a new supplemental charge which combines the Allen charge and the standards set out by the American Bar Association (A.B.A. Minimum Standards, Trial by Jury, §5.4 (b), approved 1968). The new charge emphasizes to jurors: "Do not surrender your honest conviction as to the weight or the effect of the evidence solely because of the opinion of your fellow jurors". United States vs. Silvern, 484 F 2d 879, 883 (1973). In both the Eighth Circuit and the Tenth Circuit, it has been recommended that if the Allen charge be given at all, it be given in the initial charge, to avoid the force and effect of a supplemental charge. Nick vs. United States, (8th Cir. 1941) 122 F 2d 660, 674; United States vs. Wynn (10th Cir. 1970), supra. In United States vs. Sullivan, supra, the Ninth Circuit required that, where the Allen charge is given, the jurors be reminded to give their own opinion the ultimate control. The Tenth Circuit has also recommended the use of the A.B.A. approved standards. United States vs. Munroe (10th Cir. 1970).

Those States which have formerly used the Allen charge are also moving towards its abolition. See State vs. Thomas, 86 Arizona 161 (1959), 342 P 2d 197; State vs. Randall, 137 Montana 534 (1960), 353 P 2d 1054. Other States have expressed their disapproval of the Allen charge; Bikmeier vs. Bennett, 143 Kansas 888 (1936); State vs. Noon, 20 Idaho 207 (1911); and Mid States Utility Company vs. Incorporated Telephone Company, 222 Iowa 1275 (1937).

It is defendant's contention that the Allen charge particularly as given under the circumstances which existed in the Cowles case sacrifices for reasons of judicial economy and desirability and finality of verdict the defendant's Sixth Amendment right to trial by a fair and impartial jury and a unanimous jury verdict.

B. THE TRIAL COURT ERRED IN REFUSING TO ASK CERTAIN QUESTIONS PROPOSED BY THE DEFENDANT'S ATTORNEY OF THE JURORS DURING THE VOIR DIRE EXAMINATION.

The trial court conducted the voir dire examination of the prospective jurors. The attorney for the defendant did ask at a conference at the bench that the prospective jurors be asked several questions, among them in substance: Do you

realize that the defendant is not bound to explain his side of the case since the burden of proof does in fact rest with the Government so that you would not consider the defendant's failure to testify as an indication of his guilt, would you? Also: Now, if you came to the conclusion that the prosecution had not proven the guilt of the defendant beyond a reasonable doubt and you found that a majority of the jurors believed otherwise, would you change your verdict because you were in the minority? A further question was proposed regarding the majority-minority verdict: Would the fact that you were in the minority influence your vote at all? The trial court refused to put any of the questions proposed by the defense counsel to the prospective jurors during the voir dire examination.

It is conceded that the trial court has a broad discretion as to the questions to be asked on voir dire examination of prospective jurors. Aldridge vs. United States, 283 U.S. 308, 310, 51 S. Ct. 470, 75 L. Ed. 1054. It is also clear that the trial court's exercise of this discretion is "subject to the essential demands of fairness". Aldridge vs. United States, supra. A defendant is entitled to be tried by an impartial and unprejudiced jury and the courts have stated the range of inquiry in the endeavor to empanel such a jury should be liberal. United States vs. Daily, 139 F 2d 9 (7th Cir. 1944). The Court in the United States vs. Napoleone, 349 F 2d 350 (3d Cir. 1965) stated:

> "The trial court, while empaneling a jury, 'has a serious duty to determine the question of actual bias . . .' (citing Dennis vs. United States, 339 U.S. 162, 168,70 S. Ct. 519, 521, 94 L. Ed. 734 (1950) 'the voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of preemptory challenges'". Swain vs. Alabama, 380 U.S. 202, 218-219, 85 S. Ct. 824, 835, 13 L. Ed. 2d 759 (1965).

In United States vs. Peterson, 483 F 2d 1222 (D.C. Cir. 1973), the Court stated at 1226:

> "The examination of prospective jurors is a step vital to the fairness of jury trials. The information elicited on voir dire serves the dual purpose of aiding counsel in the exercise of challenges and the Court in the determination of competence to serve. Without knowledge bearing on the qualifications of the veniremen, neither function can be performed intelligently. To the extent that the examinatorial process is deficient, the impartiality of the jury could be compromised. To achieve its wholesome goals, voir dire examination must be given a wide and liberal scope." (Citing United States vs. Napoleone, supra). "Reasonable latitude must be indulged to inquiry into attitudes and inclinations in order to assure the objectivity of the jurors ultimately chosen. (Citing Morford vs. United States, 339 U.S. 258, 259, 70 S. Ct. 586, 94 L. Ed. 815 (1950). To be sure, the trial Judge retains a broad discretion as to the questions which may be addressed, but the Supreme Court has declared the exercise of this discretion and the restriction upon inquiry at the request of counsel are subject to the essential demands of fairness." (Citing Aldridge vs. United States, supra.)

In the Cowles case, the defendant had not taken the stand at the first trial because of a past criminal record. It is submitted that the voir dire question concerning the effect of the failure of the defendant to testify might have upon a

juror was essential to a complete examination of the prospective jurors possible prejudice and also to aid defendant's counsel in making an intelligent decision whether or not to put the defendant on the stand. More importantly, the first jury at the Albany trial, after extensive deliberations could not agree on a verdict. The possibility of this occurring again was certainly not remote and the questions proposed to be asked to the jurors concerning being minority jurors were proper and most important to the defendant. There was a serious question of fact to be decided by the jurors which a similar Federal Trial jury had been unable to unanimously decide. Questions concerning the majority-minority split and jury deliberations were essential to protect defendant's rights to a fair trial.

In the case of United States vs. Blount, 479 F 2d 650 (6th Cir. 1973), the District Court's refusal during voir dire examination of prospective jurors of defendant's request to ask if jurors could accept the proposition that defendant was presumed to be innocent, had no burden to establish his innocence and is clothed throughout the trial with the presumption of innocence, was held to be erroneous.

> "Certainly a challenge to cause would be sustained if a juror expressed his incapacity to accept the proposition that a defendant is presumed to be innocent despite the fact that he has been accused in an indictment or information. It is equally likely that careful counsel would exercise a peremptory challenge if a juror replied that he could accept this proposition of law in an intellectual level but that it troubled him viscerally because folk wisdom teaches that where there is smoke there must be fire."

It is submitted that the questions requested by defendant to be asked by the prospective jurors in the Cowles case dealing directly with the question of burden of proof and failure to testify and the effect of being a minority juror, were fundamental questions to which an anticipated response by a juror may well have afforded the basis for a challenge for a cause or a preemptory challenge.

The Court in United States vs. Lewin, 467 F 2d, 1132 (7th Cir. 1972), stated that Rule 24 (A) of the Federal Rules of Criminal Procedure giving the Trial Judge the discretion to ask questions as it deems proper did not give the trial court the unlimited discretion to ignore proposed questions nor to permit arbitrary refusal to put such questions to the jurors.

The Trial Court's refusal to ask the prospective jurors during the voir dire examination the questions concerning the defendant's failure to testify and the minority-majority split during deliberations was arbitrary and capricious and violated the essential elements of fairness which must attend the voir dire examination.

C. THE TRIAL COURT ERRED IN REFUSING TO CHARGE DEFENDANT'S PROPOSED INSTRUCTIONS ON IDENTIFICATION.

Defendant's proposed instruction No. 1 dealt with the issue of identification. The relevant portions requested

but not charged by the Trial Court were as follows:

> "Where the prosecution has offered identification testimony, i.e., the testimony of an eyewitness that he saw the defendant commit the act charged, such testimony should be received with caution. An identification by a stranger is not as trustworthy as an identification by an acquaintance. Mistaken identification is not uncommon . . . careful scrutiny of such testimony is especially important when as, in this case, it is the only testimony offered by the prosectuion to connect the defendant with the act charged. Citing Cipes Criminal Defense Techniques, Volume 1, §2.16.

The sole important issue for the jury to decide in the Cowles case was whether or not the defendant, Raymond Leo Cowles, was the operator of the "getaway" car involved in the Bank robbery at the Marine Midland office in Pamelia on August 30, 1973.

As the Court stated in United States vs. Evans, 484 F 2d 1178 at 1187:

> "There is no question that identification testimony is notably fallable, and the result of it can be, and sometime has been 'the greatest single injustice that can arise out of our system of criminal law'. (Citing Gregory vs. United States, 369 F 2d 185, 190, cert. den. 396 U.S. 865). Namely, the conviction of the wrong man through a mistake in identity."

It is submitted therefore, that in the Cowles case where identification of the defendant was the key issue, the Trial Judge should have instructed the jury on the dangers of eyewitness identification. It is submitted that the rule in

United States vs. Barber, 442 F 2d 517 (Third Cir. 1971) cert. den. 404 U.S. 958 should have been followed and the jury should have been "admonished by the Court that the witnesses testimony as to identity must be received with caution and scrutinized with care". United States vs. Barber, supra, 442 F 2d 517 at 528.

In the Cowles case there was a request for a specific identification charge and under the circumstances of the Cowles case where identity was the sole issue for determination, the Barber charge would seemed to have been warranted.

D. THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF THE DEFENDANT'S CELLMATE AS TO ALLEGED ADMISSIONS MADE BY THE DEFENDANT WITHOUT NOTICE OF SUCH ADMISSIONS GIVEN TO THE DEFENDANT PRIOR TO THE COMMENCEMENT OF THE TRIAL.

One, James Gaither, testified that he and Raymond Leo Cowles were cellmates at the Oneida County Jail and at the Albany County Jail. While together at the Oneida County Jail, Gaither testified that Cowles made certain admissions against his interests. (A-257 and 258). The testimony was objected to as there was no notice given to the defense attorney of any admission or confession allegedly made by the defendant prior to the trial in Utica (A-248). In fact, the trial testimony further revealed that the Assistant U. S. attorney and the F.B.I. were fully informed of the substance of Gaither's testimony concerning the alleged admissions in December of 1973

shortly after the defendant, Raymond Leo Cowles, first trial in Albany in November of 1973 (A-261). However, no notice was ever given to the defense attorney of Mr. Gaither's reported testimony until the third day of the trial, February 6, 1974.

Rule 16 (A) of the Federal Rules of Criminal Procedure provides in part:

> "Upon motion of a defendant, the Court may order the attorney for the Government to permit the defendant to inspect and copy a photograph, any relevant (1), written or reported statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the Government."

In lieu of any Rule 16 discovery motion, the Assistant U. S. attorney had provided a copy of the defendant's statement given to F.B.I. Agent Zabowsky and certain other photographs exhibited to certain witnesses and a photograph of the line-up taken in the Sheriff's office. It was understood between the U. S. attorney and the defense attorney that any relevant matters discoverable under Rule 16 would be voluntarily given to the defense attorney without the necessity of motion. There was no question that the U. S. Government was aware of the alleged admissions made by the defendant, Raymond Leo Cowles to James Gaither in December of 1973 (A-262 to 264).

The Court in United States vs. Love, 42 F. R. D. 661 (D.C.N.H. 1967), held that discovery by the defendant of

all statements made by him relating to the cause was within scope of discovery authorized by this rule (referring to Rule 16 (A).)

The Court in United States vs. Lubomski, 277 F. Supp. 713, held that disclosure to the defendant of his recorded statements not only accords with basic fairness but does much to reduce surprise as a factor in Federal Criminal trials. At page 720, the Court stated: "The Courts favor the production of relevant statements made by defendants which are in the possession or custody of the Government". The rationale given by the Court was that "confessions or statements are highly material and of extreme value to the preparation of an adequate defense."

It is submitted therefore that Rule 16 under the circumstances presented in the Cowles case would require the Government to give notice to the defense attorney of any admission or statement allegedly obtained from the defendant which they plan to use at the trial against him. This would have afforded the defense attorney an opportunity to move under Rule 16 (A) for discovery of the statement and also would have afforded the defense to investigate the circumstances of the admission prior to and outside pressure of trial. As the Court stated in United States vs. Wilkerson, 456 F 2d, 57 (6th Cir. 1972), when dealing with an admission

of a defendant to a third party at page 61:

> "The better response would have been to say that the Government did have a statement from a witness who was to be called to testify and that the statement concerned admissions made by the defendant to a witness at a previous time but that the statement of the witness in the Government's view was not producible under Rule 16."

This extremely fair rule would have given the defendant the opportunity to move under Rule 16 (A) for production of the statement and also might well have afforded the defendant an opportunity for a pretrial hearing on the issue of whether the witness James Gaither was a Police informant. Under Federal and State rule, any secret interrogation of the defendant after finding of indictment without protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crimes. Massiah vs. United States, 84 S. Ct. 199, 377 U. S. 201. (Citing People vs. Waterman, 9 N.Y. 2d 561, 565). Thus if James Gaither was indeed a Police informant, his statements would be inadmissable since the defendant, Raymond Leo Cowles, was interrogated after he had been arraigned and represented by counsel and indeed after he had been tried for the first time. Statements made by a cellmate to another deliberately placed by prosecution in proximity to defendant in order to get admissions or confessions of a defendant would be a violation of the defendant's right. Miranda vs. Arizona, 384 U.S. 436.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff
Appellee,

against

RAYMOND LEO COWLES,

Defendant
Appellant.

Index No.

DOCKET NO. 74-1416

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF JEFFERSON *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
Copenhagen, New York

That on the 11th *day of* July *19* 74 *deponent served the annexed*
Appellant's Brief and Appendix in duplicate
on GEORGE LOWE, ESQ.
attorney(s) for Plaintiff-Appellee
in this action at FEDERAL Building, Syracuse, New York
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me
this 11th *day of* July *19* 74

Kathryn S. Chelles
Notary Public

Valerie J. Tarrant
The name signed must be printed beneath
VALERIE J. TARRANT

It is submitted Rule 16 should require that at least notice of the alleged admissions and/or confessions made by the defendant to James Gaither should have been given to the defendant prior to the commencement of the second trial in order to afford the defendant the opportunity to prepare an adequate defense.

IV. CONCLUSION

The conviction should be vacated and set aside and a new trial ordered.

RESPECTFULLY SUBMITTED

LEE CLARY
Attorney for Defendant-Appellant
Office and Post Office Address
316 Sherman Street
Watertown, New York 13601
Telephone: (315) 782-1670